Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-1076

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

JEAN LYONS, Guardian of The Person and Estate of Richard Raymond Whittington, a Minor,

Petitioner,

v.

DANIEL BUTE, Conservator of the Estate of Cherry Whittington, an Incompetent, and CHERRY WHITTINGTON a/k/a CHERRY WHITTINGTON PRICE,

Respondent.

Reply Brief

KENNETH A. KOZEL
PETZ AND KOZEL
Second at Joliet Street
La Salle, Illinois 61301
Telephone: (815) 223-4400
Counsel for Petitioner

Counsel of Record

ARGUMENT

On page 9 of the Respondent's Brief In Opposition, the Respondent admits that no notice of the hearing on termination of the conservatorship was given to the Petitioner for the reason that notice was not required under the newly-enacted statute. The Respondent then proceeds to cite Paul v. Davis in support of her argument that the newly-enacted statute does not infringe upon due process (Page 11). On the contrary, the Paul decision supports the Petitioner's argument that the newly-enacted statute does in fact deny due process (Paul v. Davis, 424 U.S. 693 (1976)). Justice Rehnquist, writing for the Court in Paul, stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process

> Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status...(424 U.S. 710,711)
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> ...In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment...(424 U.S. 711)

The procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment should be invoked in this case since the State of Illinois, has done exactly that which Justice Rehnquist has described in the Paul case. The State of

debtor had previously given the creditor the right to possession in these circumstances by contract. (Mitchell v. W.T. Grant Co., 416 U.S. 600 (1975). The debtor had the right to re-acquire possession of the property by posting a bond but chose not to do so. The reviewing court found no due process violation since the debtor was free to reacquire possession or assert his right to possession at trial on the merits. This Court stated that the usual rule is that "where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." In the instant case both liberty interests and property interests are involved. Furthermore, the order terminating the conservatorship was

not previously bargained away by the child's guardian in a contract. The order terminating the conversatorship was an "ultimate judicial determination" and not hardly a "mere postponement". The order terminating the conservatorship enabled the Respondent to obtain a superior right to custody of the child over and above that of the child's guardian. The order terminating the conservatorship was a final determination and not a pre-trial determination of the issues of Cherry Whittington's competency and fitness. The re-litigation of these issues in an entirely different case brought to terminate the child's guardianship and restore custody of the child to the parent is prohibited by res judicata principles.

CONCLUSION

For the additional reasons stated, the petition should be granted.

Respectfully submitted,

KENNETH A. KOZEL
PETZ AND KOZEL

Counsel for the
Petitioner